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MICHAEL RODAK, JR.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-158

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY,
a Corporation,
Petitioner,

against

CLYDE H. DUNCAN,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit

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SUPREME COURT OF THE UNITED STATES

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No. .....

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY,
a Corporation,
Petitioner,

against

CLYDE H. DUNCAN,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit

Petitioner, St. Louis-San Francisco Railway Company, seeks a writ of certiorari to review a judgment of the United States Court of Appeals for the Eighth Circuit affirming a judgment of the United States District Court for the Eastern District of Missouri, Eastern Division, entered on a verdict of a jury for Respondent and against Petitioner, assessing Respondent's damages at $94,000.00 on a claim based upon the Federal Employers' Liability Act (45 U.S.C. Sec. 51 et seq.).

OPINIONS BELOW

There was no opinion in the District Court (Wangelin, J.). The opinion of the Court of Appeals upon Petitioner's appeal is not yet reported and is reprinted as Appendix A.

GROUNDS UPON WHICH JURISDICTION OF THIS COURT IS INVOKED

The date of the judgment sought to be reviewed is May 15, 1973, and the judgment was entered upon that date. The order denying Petitioner a rehearing or rehearing in banc was entered June 19, 1973.

This Court has jurisdiction pursuant to Section 1254(1) of the Judicial Code (28 U.S.C. Sec. 1254(1)).

QUESTIONS PRESENTED FOR REVIEW

Where this Court has declared that the proper measure of damages in cases arising under the Federal Employers' Liability Act is a matter of federal law, does either the quantum of proof or the instructions to the jury on matters to be considered in arriving at the measure of damages depend upon the United States Circuit in which the case is tried or should those matters be determined on a uniform basis throughout the Federal court system?

A. May a jury, in a case arising under the Federal Employers' Liability Act, return a verdict for alleged loss of future earnings in the absence of evidence and instructions regarding the manner in which such loss of future earnings may be computed and reduced to present value?

B. May a trial court refuse to advise the jury that it may not consider income taxes in its deliberations regarding the amount of damages to which a plaintiff in an action arising under the Federal Employers' Liability Act may be entitled?

STATEMENT OF THE CASE

Clyde H. Duncan, Respondent (sometimes hereinafter called "Duncan"), a locomotive engineer employed by the St. Louis-San Francisco Railway Company, Petitioner herein (sometimes hereinafter called "Frisco"), invoked the jurisdiction of the District Court below pursuant to the Federal Employers' Liability Act (45 U.S.C. Sec. 51 et seq.).[1] After trial to the court and jury in the United States District Court for the Eastern District of Missouri, Eastern Division, H. Kenneth Wangelin, Judge, Duncan recovered a judgment against Petitioner on the jury's verdict, assessing his damages at $94,000.00.

Duncan alleged that he sustained an injury while operating a locomotive drawing a train of cars in Petitioner's railroad yards at Memphis, Tennessee on February 10, 1968, when he ran the locomotive through an open switch and collided with a train of the Missouri Pacific in an adjacent track. His allegations of negligence related to Petitioner's failure to provide him with a safe place of work in that the switch was left open, or in the alternative, that the switch was not equipped with a target. He alleged loss of wages in the sum of $9,000.00, and further alleged permanent injuries and inability to work. Petitioner denied its negligence and asserted that the sole cause of Duncan's injuries was his own negligence in operating the locomotive, or in the alternative, that any recovery should be diminished in proportion to his negligence. The issues as to negligence and contributory negligence were hotly contested, as was the proof of damages. Respondent lost time from his work, allegedly as a result of his injuries, during portions of 1968 and 1969, resulting in lost wages of approximately $5,000.00. However, in 1970 and 1971,

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[1] The pertinent text of the Federal Employers' Liability Act is reproduced hereinafter as Appendix B, p. A-14.

the two years preceding the trial, he had worked regularly with no loss of earnings. Duncan's testimony was that while working he suffered pain. His medical evidence ascribed his pain to the occurrence in question and indicated that because of the pain, Duncan might not be able to work to retirement age of 65 (Duncan was 54 years old at the time of the trial). These claims were traversed by Frisco's medical evidence. Duncan presented no actuarial tables, no evidence of the earning power of money, and no evidence of any method by which the present value of money could be computed.

Frisco objected to the trial court's permitting the jury to consider loss of future earnings on the ground that no evidence had been presented nor any instruction given from which the jury could rationally apply the present value rule.[2]

Frisco also tendered to the trial court an instruction derived from *Domeracki v. Humble Oil & Refining Co.*, 443 F.2d 1245 (3rd Cir. 1971), *cert. denied* 404 U.S. 883, 92 S.Ct. 212, 30 L.Ed.2d 165 (1971), that the jury should not consider income taxes in arriving at any award of damages. This instruction was refused.[3]

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[2] The jury was charged that "The award of damages for loss of contributions from future earnings, if any, must be reduced to its present cash value and adequate allowance must be made for the earning power of money." (Slip Opinion p. 11, Appendix A p. A-1).

[3] The requested instruction read: "I charge you, as a matter of law, that any award made to the plaintiff in this case, if any is made, is not income to the plaintiff within the meaning of the federal income tax law. Should you find that plaintiff is entitled to an award of damages, then you are to follow the instructions already given to you by this Court in measuring those damages, and in no event should you either add to or subtract from that award on account of federal income taxes."

ARGUMENT

I

Where Congress Has Created a Remedy, Federal Courts Should Apply Uniform Standards as to the Quantum of Proof Necessary to Sustain an Award of Damages for Loss of Future Earnings and Instructions to the Jury on Matters to Be Considered in Awarding Damages.

Petitioner presents for resolution by this Court two related and important questions regarding the proper applications of this Court's decision in *Chesapeake & O. R. Co. v. Kelly*, 241 U.S. 485, 36 S.Ct. 630, 60 L.Ed. 1117 (1916). The questions presented are posited on conflicting applications of the rule of that case among the Second, Third, Fifth, Sixth and Eighth Circuits.[4]

This Court in *Kelly* laid down what has come to be known as the "present value" or "present worth" rule which requires that, "when future payments or other pecuniary benefits are to be anticipated, the verdict should be made upon the basis of their present value only" (241 U.S. at 491, 60 L.Ed. at 1122).

Kelly left undecided, however, the question of what information the jury should receive in applying the present value rule:

> "We are aware that it may be a difficult mathematical computation for the ordinary juryman to calculate in-

[4] As appears from the opinion of the Eighth Circuit, Petitioner raised several additional questions in its appeal to that Court. Although not conceding that those additional questions were properly decided by the Courts below, Petitioner presents only those questions on which there is clear conflict among the Circuits and involving matters of general importance in the trial of Federally created remedies.

terest on deferred payments, with annual rests, and reach a present cash value. Whether the difficulty should be met by admitting the testimony of expert witnesses, or by receiving in evidence the standard interest and annuity tables in which present values are worked out at various rates of interest and for various periods covering the ordinary expectancies of life, it is not for us in this case to say. . . .

"But the question of the *proper measure of damages is inseparably connected with the right of action,* and in cases arising under the Federal employer's liability act *it must be settled according to general principles of law as administered in the Federal courts.*" (241 U.S. at 491, 60 L.Ed. at 1122-1123) (emphasis supplied).

As we point out, the United States Courts of Appeals do not agree on what are the "general principles of law" governing the measure of damages.

II

This Court Should Enunciate as a Rule of Law What It Clearly Implied in Kelly—That Juries Are Entitled to Appropriate Guidance in the Application of the Present Value Rule.

The Eighth Circuit in the instant case upheld the action of the trial court in permitting the jury to consider loss of future earnings in the absence of evidence or instructions regarding the manner in which the present value of an award for loss of future earnings should be computed (Slip Opinion p. 11, Appendix A p. A-1). In so doing it agreed with the position of the Court of Appeals for the Sixth Circuit in *Pennsylvania Railroad Company v. McKinley,* 288 F.2d 262 (6th Cir. 1961).

In adopting the Sixth Circuit's position in *McKinley*, the Eighth Circuit rejected the position of the Court of Appeals for the Third Circuit in *Ballantine v. Central Railroad of New Jersey*, 460 F.2d 540 (3rd Cir. 1972), *cert. denied* 409 U.S. 879 (Oct. 10, 1972) a Federal Employers' Liability Act case in which that court vacated a judgment for an injured employee and remanded for a new trial on the issue of damages because of the employee's failure to provide evidence and appropriate mathematical guidance on the method of reducing lost future earnings to present worth. This action was taken even though liability was admitted.

The Third Circuit in *Ballantine* applied to a claim under Federal law its prior decisions in *Russell v. City of Wildwood*, 428 F.2d 1176 (3rd Cir. 1970) and *Haddigan v. Harkins*, 441 F.2d 844 (3rd Cir. 1970), each of which arose under state law.

The conflicting results between the Third and Sixth Circuits become especially apparent when it is considered that the Third Circuit in *Russell v. City of Wildwood, supra*, cited this Court's decision in *Kelly* as authority in support of its decision that the jury was entitled to receive evidence and appropriate mathematical guidance with respect to the appropriate interest rate and computation of present value "if they were to act rationally and not upon mere conjecture or guess" (428 F.2d at 1183). The Sixth Circuit in *Pennsylvania Railroad Company v. McKinley, supra*, while recognizing the present value rule laid down in *Kelly*, held that the jury need not receive any guidance regarding its application. Yet even the Sixth Circuit has consistently remanded for recomputation of damages in non-jury cases where the award for loss of future earnings was not reduced to present value. *Sleeman v. Chesapeake and Ohio Railway Company*, 414 F.2d 305 (6th Cir. 1969);

Petition of United States Steel Corporation, 436 F.2d 1256 (6th Cir. 1970).[5]

We respectfully suggest the reasoning of the Third Circuit is apposite:

> "The application of the present worth rule is generally conceded to be beyond the understanding and capabilities of most lay persons serving on juries. At the very least, it is a tedious and laborious task. The involved process of reducing future losses to present worth has, undoubtedly, led to confusion and guesswork verdicts. Reason, logic and fairness would, therefore, dictate that enlightenment is necessary . . .
>
> "We hold that once evidence is presented and recovery is sought for future lost earnings, the jury is entitled to receive evidence and appropriate mathematical guidance on the method of reducing lost future earnings to present worth, if they are to act rationally and 'not upon mere conjecture and guess'." *Ballantine v. Central Railroad of New Jersey*, 460 F.2d 540, 543, 544 (3rd Cir. 1972).

III

This Court Should Further Declare That in All Actions Arising Under the Federal Employers' Liability Act, the Jury Should Be Advised, Upon Request, That Any Award of Damages It May Make Will Not Be Subject to Federal Income Taxes.

On the question whether the jury should be advised that any award of damages it may make will not be subject to

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[5] The Second Circuit position, although not clearly expressed, appears to recognize the jury's need for guidance in applying the present value rule. *McWeeney v. New York, N. H. & H. R.R. Co.*, 282 F.2d 34, 35-36 (2d Cir. 1960), *cert. denied*, 364 U.S. 870, 81 S.Ct. 115, 5 L.Ed.2d 93 (1960); *Myers v. Town of Harrison*, 438 F.2d 293, 298-300 (2d Cir. 1971), *cert. denied*, 404 U.S. 828, 92 S.Ct. 64, 30 L.Ed.2d 57 (1971).

income taxes, there is also considerable conflict among the circuits,[6] and in at least one instance,[7] within a circuit.

The Eighth Circuit in the instant case refused to rule on the question, quoting from two earlier opinions in which it stated:

> " 'In view of the state of the law and the record in the instant case, this Court will not pass on the issue at the present time. Even if this panel were to adopt the instruction, this panel would do so only prospectively. Therefore, such a holding is not necessary for resolution of the instant case. The question is more properly left open for future consideration and perhaps for *en banc* determination by the entire court.'
>
> "*Rouse v. Chicago, Rock Island and Pacific Railroad Company,* Nos. 72-1124 and 72-1161, slip opinion at 6 (8th Cir. March 1, 1973);[8] *Raycraft v. Duluth, Missabe and Iron Range Railway Company,* No. 72-1049, slip opinion at 12 (8th Cir. January 16, 1973)[9]" (Slip Opinion p. 13, Appendix A p. A-1).

The Eighth Circuit's refusal to pass on this issue in the instant case, as well as in *Raycraft* and *Rouse,* deprives

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[6] See, e.g., *McWeeney v. New York, N. H. & H. R.R. Co.,* 282 F.2d 34 (2d Cir. 1960), *cert. denied* 364 U.S. 870, 81 S.Ct. 115, 5 L.Ed.2d 93 (1960); *Domeracki v. Humble Oil & Refining Co.,* 443 F.2d 1245 (3rd Cir. 1971), *cert. denied* 404 U.S. 883, 92 S.Ct. 212, 30 L.Ed.2d 165 (1971); *Laird v. Hudson Engineering Corporation,* 449 F.2d 216 (5th Cir. 1971), *cert. denied sub nom. United States Steel Corp. v. Laird,* 405 U.S. 955, 92 S.Ct. 1177, 31 L.Ed.2d 232 (1972); *Greco v. Seaboard Coast Line Railroad Company,* 464 F.2d 496 (5th Cir. 1972), *reh. denied* 468 F.2d 822 (1972), *cert. denied* ... U.S. ..., 41 U.S.L.W. 3496 (3/19/73, No. 72-967); *Payne v. Baltimore & Ohio R.R.,* 309 F.2d 546 (6th Cir. 1962), *cert. denied* 374 U.S. 827, 83 S.Ct. 1865, 10 L.Ed.2d 1051 (1963).

[7] Compare *Scruggs v. Chesapeake and Ohio Railway Company,* 320 F.Supp. 1248 (W.D.Va. 1970) and *Plant v. Simmons Company,* 321 F.Supp. 735 (D.Md. 1970), both within the Fourth Circuit.

[8] Subsequently reported at 474 F.2d 1180.

[9] Subsequently reported at 472 F.2d 27.

litigants in this Circuit of needed guidance—guidance which this Court should provide.

Only two years ago the Third Circuit in *Domeracki v. Humble Oil & Refining Co.*, 443 F.2d 1245 (3rd Cir. 1971), *cert. denied* 404 U.S. 883, 92 S.Ct. 212, 30 L.Ed.2d 165 (1971), a Jones Act[10] case, stated:

> "The instruction requested in this case would not require the introduction of any additional evidence. No reference to any IRS regulation or to any specific statute would be necessary. No tax expert would need be summoned as a witness. No tax tables would be hauled into the courtroom. No additional computation would be required. In brief, such an instruction would not open the trial to matters irrelevant to traditional issues in personal injury litigation, and thus would in no way complicate the case or confuse the jury.
>
> "Moreover, there are positive and persuasive reasons for giving the instruction. We are not unaware of the pervasive impact of taxation— federal, state, and local —in the lives of Americans. It has been properly observed that what we know as men, we should not ignore as judges. We know of the widespread attention given by the media to the tax consequences affecting winners of the Irish Sweepstakes, state-conducted lotteries, and contests conducted on television. We take judicial notice of the 'tax consciousness' of the American public. Yet, we also recognize, as did the court in Dempsey v. Thompson, 363 Mo. 339, 251 S.W.2d 42 (1952),

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[10] 46 U.S.C. Sec. 688. This court stated in *Mitchell v. Trawler Racer*, 362 U.S. 539, 546-547, 80 S.Ct. 926, 4 L.Ed.2d 941, 946 (1960): "In any event, with the passage of the Jones Act in 1920, 41 Stat. 1007, 46 U.S.C. Sec. 688, Congress effectively obliterated all distinctions between the kinds of negligence for which the shipowner is liable, as well as limitations imposed by the fellow-servant doctrine, *by extending to seamen the remedies made available to railroad workers under the Federal Employers' Liability Act.*" (emphasis added). Thus, Jones Act and Federal Employers' Liability Act cases are governed by the same federal standards insofar as the measure of damages is concerned.

> that few members of the general public are aware of the special statutory exception for personal injury awards contained in the Internal Revenue Code. . . . "Given the absence of complications that an instruction would engender, the tax consciousness of the American public, and the general lack of knowledge about the statutory exclusion, we hold that in personal injuries actions the trial courts in this Circuit must, in the future, upon request by counsel, instruct the jury that any award will not be subject to federal income taxes and that the jury should not, therefore, add or subtract taxes in fixing the amount of any award."

This Court stated in *Chesapeake & O. R. Co. v. Kelly*, "It is self-evident that a given sum of money in hand is worth more than the like sum of money payable in the future" (241 U.S. at 489, 60 L.Ed. at 1122). In like manner, a given sum of money, not subject to income taxes, is worth more than the like sum of money subject to the income tax laws. To the extent then that jurors mistakenly assume that any award of damages they may make is subject to the income tax laws, and thereby enhance their award, the plaintiff is being afforded "more than compensation." The Third Circuit has judicially noticed this possibility and provided a simple method of avoiding it. This court should adopt that position.

CONCLUSION

Perhaps the most cogent expression of a defendant's right to demand evidence and instructions of the type here involved is the statement of the Third Circuit in *Ballantine*, where the court stated, 460 F.2d at 544:

> "The defendant is entitled to a charge which will direct the jury's attention to every item and consideration which may substantially reduce the plaintiff's loss so that the jury does not charge the defendant with a loss which the plaintiff would never have to suffer. Even handed justice requires nothing less than this."

(quoting from the dissent of Lumbard, C.J., in *McWeeney v. New York, N. H. & H. R.R. Co.*, 282 F.2d 34, 40 (2d Cir. 1960)).[11]

The unguided search of the jury for a proper verdict in this cause resulted in a verdict of nineteen times the wage loss of Respondent.

We submit that the continuing rise in wages will result in increasingly larger verdicts, verdicts which will be unreasonably inflated unless this Court adopts the position of the Third Circuit as to the quantum of proof required for an award of damages for loss of future earnings, and as to instructing the jury that it should not consider income taxes in awarding damages.

The judgment of the Court of Appeals should be reversed and the Court instructed to remand with instructions to the District Court to grant Petitioner's motion for a new trial.

The petition for a writ of certiorari should be granted.

Respectfully submitted

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[11] Chief Judge Lumbard's statement in dissent now represents the Second Circuit rule. See *Myers v. Town of Harrison*, 438 F.2d 293, 299-300 (2d Cir. 1971), *cert. denied* 404 U.S. 283, 92 S.Ct. 64, 30 L.Ed.2d 57 (1971).

APPENDIX A

United States Court of Appeals
for the Eighth Circuit

No. 72-1399

Clyde H. Duncan,
Plaintiff-Appellee,

v.

St. Louis-San Francisco Railway Company, a Corporation,
Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Missouri

Submitted: March 21, 1973

Filed: May 15, 1973

Before Van Oosterhout, Senior Circuit Judge, and Mehaffy and Heaney, Circuit Judges.

Heaney, Circuit Judge.

The defendant appeals from a jury verdict of $94,000 awarded to its employee in an action under the Federal Employers' Liability Act, 42 U.S.C., §51, *et seq.*

Duncan, a locomotive engineer, employed by the St. Louis-San Francisco Railway Company (Frisco), sustained

injuries when the train he was operating on a run from Memphis, Tennessee, to St. Louis, Missouri, collided with a Missouri Pacific train in Memphis on February 10, 1968. Duncan was proceeding in a northerly direction through Frisco's Memphis railroad yards on the mainline which would take the train to St. Louis. At this point, Duncan and the other crew members on the head engine observed a Missouri Pacific train, traveling in a southerly direction, approaching on the adjacent Missouri Pacific track. There are a number of switches located on Frisco's mainline which serve to divert trains onto other tracks. Many of these switches are equipped with targets which show at a distance whether the switch is in an open or closed position. However, other switches do not have targets, and their position must be determined by observing the position of the switching track itself. This latter type of switch is referred to as a "puzzle switch." Duncan's train reached one such puzzle switch and veered off the mainline track crashing into the side of the Missouri Pacific train. This occurred because the puzzle switch had been left open—*i. e.*, set for a diverging movement and not for a through movement.

Duncan was injured in this crash. He received medical treatment and hospitalization. On July 27, 1970, he commenced this action charging that the collision and his injuries resulting therefrom were directly and proximately caused by the negligence and carelessness of Frisco. He alleged that the injuries were permanent and had curtailed his leisure activities, shortened his work life and subjected him to pain and medical expenses for the rest of his life. The case was tried to a jury, and a judgment was entered in Duncan's favor on January 19, 1972.

Frisco contends on this appeal that the trial court erred:

(1) In failing to grant its motion for judgment notwithstanding the verdict because there was insufficient evidence to support a finding of negligence on the part of Frisco.

(2) In allowing Duncan's counsel to argue that the testimony given by one of his medical witnesses was unworthy of belief.

(3) By denying Frisco's motion for a mistrial where Duncan's counsel read into the record part of the depositions of other employees of Frisco during his case-in-chief and then, on final argument, commented on the failure of Frisco to call these same persons as witnesses.

(4) By instructing the jury that Frisco's Operating Rule 104 was applicable, that the rule had been violated and that a violation of the rule was negligence per se.

(5) In instructing the jury that its verdict might include damages for loss of future earnings reduced to present value because there was no evidence to support an award of damages for future loss of earnings and no evidence or instructions regarding the manner in which the present value of such an award should be computed.

(6) In refusing to instruct the jury that any award made to Duncan would not be subject to federal income tax.

We review these contentions seriatim.

(1) Frisco's argument concerning sufficiency of the evidence is: first, that the record is devoid of any evidence to support a finding that Frisco was negligent; and, second, that Duncan's failure to observe the position of the puzzle switch was the sole cause of the accident.

With respect to the first issue, Frisco agrees that the switch was lined for a diverging movement, but contends that for it to be liable, Duncan was obligated to prove either that the switch was lined for a diverging movement by Frisco, or that the switch had been lined for a diverging movement for a period of time sufficient to charge Frisco with knowledge of its position. We disagree. Under F.E.L.A. law, the railroad employer is required to pro-

vide its employees with a reasonably safe place to work. *Chicago Great Western Railway Company v. Casura*, 234 F.2d 441, 447 (8th Cir. 1956). Failure to do so constitutes negligence. Moreover, this duty is a nondelegable one. *Payne v. Baltimore and Ohio Railroad Company*, 309 F.2d 546, 549 (6th Cir. 1962), *cert. denied*, 374 U.S. 827 (1963). Accordingly, Frisco cannot escape liability by passing the blame for misalignment of the switch onto the other railroads using the switch, if the presence of the condition was found to constitute an unsafe place to work. To hold otherwise would be contrary to the position taken by the Supreme Court in *Shenker v. Baltimore & Ohio R. Co.*, 374 U.S. 1, 11 (1963):

> "• • • If recovery were denied in this case the railroads, by the simple expedient of doing each other's work, could tie their employees up in legal technicalities over the proper railroad to sue for injuries and perhaps remove from coverage of the Act a significant area of railroad activity. • • •"

In testing the sufficiency of the evidence, we are bound to view the evidence in the light most favorable to the prevailing party and to resolve all reasonable inferences in favor of that party. Our review of the record reveals that there is substantial evidence which supports a finding that Frisco was negligent. It is undisputed that the switch was lined for a diverging rather than a mainline movement, and that the track and puzzle switch were owned by Frisco. Duncan's theory was that the custom in this railroad yard and Rule 104[1] required that if someone used the switch, they either had to line the switch back for a mainline move-

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[1] The pertinent portion of Operating Rule 104 reads as follows: "The normal position of a main track switch is for main track movement and it must be lined and locked in that position except when changed for immediate movement. When a main track switch is lined in other than normal position an authorized employe [sic] must remain near enough to switch to be able to line it for main track upon the approach of a train."

ment or post an authorized employee near enough to the switch to be able to line the switch for a mainline movement upon the approach of a train. Here, it is conceded that neither of these requirements was satisfied. Duncan contends that this fact, coupled with the undisputed fact that the switch did not have a target or other signal, constituted an unsafe place of work and, hence, negligence on the part of Frisco. Under his theory, this was true because he contended that it was impossible for him, as an engineer, to determine the position of the switch until it was too late to avoid the accident. His was a permissible theory, and there is substantial evidence in the record in support of it. There is also evidence which supports Frisco's position that the accident was caused by Duncan's negligence, and that theory was also submitted to the jury. The jury was correctly instructed that under F.E.L.A. law, contributory negligence on the part of the employee does not bar his claim but only serves to reduce his damages in proportion to the amount of negligence attributable to the employee. See, 45 U.S.C. § 53. The jury chose to believe Duncan's evidence and rendered a verdict in his favor. In view of the fact that there is substantial evidence to support Duncan's theory, we cannot upset the jury's verdict.

(2) During his case-in-chief, Duncan called Dr. Raymond Ritter as one of his medical witnesses. Dr. Ritter was one of a number of doctors who treated Duncan for his injuries and, in some respects, his testimony was less favorable to Duncan than was that of other medical witnesses. In the course of his testimony, Dr. Ritter admitted that a portion of his practice was comprised of examining and treating employees of Frisco, and that he was paid by the railroad for those services. In his final argument, Duncan's counsel made reference to Dr. Ritter as a railroad doctor and suggested to the jury that, as such, his testimony was not entitled to as much weight or credibility as was that of other medical witnesses called to testify by Duncan. Frisco,

on this appeal, contends that these comments of Duncan's counsel violated this Court's rule prohibiting the impeachment of one's own witness. We disagree.

The Eighth Circuit cases cited by Frisco are distinguishable from this one. They dealt with impeachment of one's own witness by cross-examination and not comments during final argument. We are satisfied that the comments objected to constituted a permissible exercise of counsel's right to comment on the weight and credibility that should be attributed to a witness's testimony. Counsel is to be afforded wide latitude in his argument to the jury, and the trial court has a great deal of discretion in regulating the scope of the argument. The comments here were confined to the evidence and reasonable inferences which could be drawn therefrom, and we hold that the trial court did not abuse its discretion in permitting these comments by Duncan's counsel. See, *Chapman v. Alton R. Co.*, 117 F.2d 669, 672 (7th Cir. 1941).

(3) Duncan's counsel read into the record parts of depositions taken of other employees of Frisco who were members of the train crew at the time of the accident. The gist of the testimony admitted was: (a) that Operating Rule 104 applied to the puzzle switch; (b) that the position of the switch could not be determined prior to reaching the "blind spot;" (c) that the attention of Duncan and the other crew members was diverted by the approach of the Missouri Pacific train; and (d) that placing a target on the switch would have alerted the crew to its open position long before the engine reached it. This evidence was largely corroborative of Duncan's own testimony. Neither party called the crew members to testify in person. However, in his argument to the jury, Duncan's counsel commented on the failure of Frisco to do so. He suggested that the reason it failed to do so was because these men would have testified adversely to the railroad.

Frisco contends that the trial court erred in denying its motion for a mistrial. First, it contends that the witnesses, though employees of Frisco, were equally available to both parties and, therefore, the comments were improper. Second, it argues that because portions of the depositions were read into the record, counsel could not comment on the railroad's failure to call the witnesses, as to do so would allow the plaintiff to gain both benefit of the evidence and the inference. We disagree.

The propriety of arguments to the jury is a procedural question governed by federal law. See, *e.g., Illinois Central Railroad Company v. Staples,* 272 F.2d 829, 834 (8th Cir. 1959). Moreover, under federal law, counsel has great latitude in arguments to the jury, and considerable discretion is given to the trial court to control these arguments. *Yeargain v. National Dairy Products Corporation,* 317 F.2d 779, 780 (8th Cir. 1963). We find no abuse of that discretion here.

The well-established rule in this Circuit is that:

> "• • • [W]here witnesses are employees of one of the parties, they are not equally available to the other party, and failure to call them, where it appears that they may have knowledge of some material fact, warrants the inference that had they been called their testimony would have been adverse to the party failing to call them. • • •"

Illinois Central Railroad Company v. Staples, supra at 834. Under this rule, the comments of Duncan's counsel were permissible.

Frisco argues that the above rule does not apply where the plaintiff is an employee of the railroad rather than an outsider. It supports its argument with a quote from a recent Second Circuit decision:

> "• • • Whatever might be the case in an action by a third party against the employer, we see no factual

> basis in this day and age for thinking that, in the absence of evidence of personal hostility, a subordinate employee would be more favorable to a corporate employer, than to a fellow-worker."

Felice v. Long Island Railroad Company, 426 F.2d 192, 195 n. 1 (2nd Cir.), *cert. denied*, 400 U.S. 820 (1970).

Felice is distinguishable from the instant case in that it involved comments by the judge and not counsel. In any event, while we are not persuaded that our long-standing rule should be limited to accord with *Felice*, the comments would still be permissible under a sound principle adopted from McCormick on Evidence in *Felice*:

> "* * * [W]here * * * 'the witness would be a likely to be as favorable to one party as the other,' * * * the judge 'should permit either party to argue the inference against the adversary.' "

Felice v. Long Island Railroad Company, supra at 195.

We also are not persuaded that this Circuit's rule permitting comment by counsel on the failure of his adversary to call certain witnesses should be abandoned here because Duncan's counsel had previously introduced portions of the witnesses' depositions into evidence. See, *Chesapeake & O. Ry. Co. v. Richardson*, 116 F.2d 860, 865 (6th Cir.), *cert. denied*, 313 U.S. 574 (1941).

(4) Frisco contends that the following instruction of the trial court was improper:

> "If you find from all the evidence that the defendant failed to enforce or violated its Operating Rule No. 104 in either of the respects claimed by plaintiff;[2] * * *

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[2] Earlier in the instruction, the trial judge had set out the plaintiff's position:

> "It is the position of plaintiff, Clyde Duncan, that at the time and place in question, the defendant was negligent in one or more of the following respects:
>
> "(1) that the defendant failed to enforce and violated its Operating Rule No. 104 which required that the puzzle switch

and if you further find that as a result of such actions or failure to act the defendant failed to exercise ordinary care to provide plaintiff with reasonably safe conditions and place of work; and that defendant was thereby negligent, and that such negligence either in whole or in part caused plaintiff to sustain injury, then your verdict should be in favor of the plaintiff and against the defendant."

Frisco argues that the court erred by assuming in this instruction that Rule 104 applied to the puzzle switch. We do not agree. Early in the trial, Frisco stipulated that as an engineer, Duncan "was bound by these rules," "had a right to rely upon these rules being obeyed," "was to operate the train in accordance with these rules," and "had the right to rely that the rules would be observed by others." Although later in the trial Frisco attempted, through one of its witnesses, to establish that the rule technically did not apply to this particular switch, at no time did it ask relief or modification from the stipulation.

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mentioned in evidence be lined and locked for a northbound main track movement;

"(2) that the defendant failed to enforce and violated its Operating Rule No. 104 which required that when the puzzle switch was lined for a crossover or diverging movement, an authorized employee must remain near enough to be able to line the switch for a main track movement upon the approach of a train;

"(3) that the defendant failed to provide a target or other signal or device on said puzzle switch which would have alerted the plaintiff, or other members of the crew, that the switch was not lined and locked for a northbound main track movement and instead was lined for a diverging or crossover movement to the Missouri Pacific track east of the main track;

"(4) that in failing to enforce and in violating its said Operating Rule No. 104 and in failing to have said puzzle switch equipped with a target or other signal or device to warn plaintiff and his crew when said puzzle switch was lined for a diverging or crossover movement the defendant failed to exercise ordinary care to furnish plaintiff with a reasonably safe place and conditions to work."

It is our view that the stipulation did provide that Rule 104 was applicable to the switch, and that it would not be appropriate to relieve Frisco from the stipulation here. See, *Farmers Co.-Op. El. Ass'n Non-Stock, Big Springs, Neb. v. Strand*, 382 F.2d 224, 231 (8th Cir.), *cert. denied*, 289 U.S 1014 (1967). Moreover, there is substantial testimony in the record that Rule 104 did apply to the switch in question.

Frisco alternately contends that the court erred in failing to instruct the jury with respect to other applicable Operating Rules. We disagree. The trial court did instruct with respect to Rules 93 and 958.[3] Instructions as to the additional rules would have been cumulative and confusing, and their omission was not prejudicial.

We likewise find no merit to Frisco's contention that the trial court improperly instructed the jury that Rule 104 had been violated and that such a violation was negligence per se. The instruction, when read as a whole, required the jury to find that "the defendant had failed to enforce or violate its Operating Rule No. 104" and to further find that:

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[3] "It is the position of the defendant that at the time and place in question Clyde Duncan was negligent in one or more of the following respects, in that he failed to observe and follow the following rules of the defendant:

"Rule 93—and I'm reading part of that rule: Within yard limits the main track may be used, providing that the trains must move within yard limits prepared to stop short of train or anything that may require the speed of a train to be reduced.

"Rule 958: Enginemen must, and firemen—when duties permit—will, keep a constant and vigilant lookout, carefully note all signals and observe the position of switches, also watch for obstructions and defective track.

"They must keep in mind location of all fixed signals in order that the absence of a signal may be noted and action taken in accordance with the rules.

"While passing through cities, towns and yards, and approaching public crossings, there must be no failure to keep a careful lookout ahead from both sides of the engine."

> "* * * as a result of such actions or failure to act the defendant failed to exercise ordinary care to provide the plaintiff with reasonably safe conditions and place of work and that the defendant was thereby negligent * * *"

Frisco makes other objections to this portion of the instructions, but we are of the view that they are also without merit.

(5) Frisco's assertion that there was no evidence that Duncan would suffer loss of earnings in the future is clearly contrary to the record. Three of the medical witnesses, who treated the plaintiff, affirmatively testified that they believed his work life would have to be cut short of its ordinary length as a consequence of injuries sustained by him in the train accident. Frisco also argues that it was error to have permitted the jury to award damages to Duncan for loss of future earnings without there either being evidence or instructions regarding the manner in which the present value of such an award should be computed. Frisco makes this contention even though at trial it did not request such an instruction. We are persuaded that the trial court's instruction on this issue was sufficient. It served to alert the jury to the fact that they had to take into consideration the earning power of money and reduce it to its present value:

> "The award of damages for the loss of contributions from future earnings, if any, must be reduced to its present cash value and adequate allowance must be made for the earning power of money."

We agree with the position taken by the Sixth Circuit in *Pennsylvania Railroad Company v. McKinley,* 288 F.2d 262 (6th Cir. 1961). *Contra, Ballantine v. Central Railroad of New Jersey,* 460 F.2d 540 (3rd Cir.), *cert. denied,* 41 U.S.L.W. 3187 (October 10, 1972). The Sixth Circuit held that:

> "* * * a jury, unaided by specific testimony as to money values, could themselves, being told that the award should be only money value, properly apply the applicable rule."

Pennsylvania Railroad Company v. McKinley, supra at 265. It reasoned that:

> "Jurors are presumed to be intelligent people, generally aware, from today's economy and their own experience with it, of the earning value of money when placed in safe investments. While, indeed, more could have been said on the subject, if request had been made, we cannot say that the jury misunderstood the trial judge when he told them that for future loss of earning capacity they were to award only the 'money value' of such loss and to award only such sum as would 'compensate' for the plaintiff's loss of future earning capacity. They were aware that their verdict would be presently and immediately placing money in the hands of the plaintiff as 'compensation' for these future losses."

Id.

(6) Frisco's final contention is that the trial court erred in refusing to instruct the jury to the effect that any award which Duncan was to receive would not be subject to federal income taxes. Panels of this Court on two recent occasions have been faced with the same issue and, in both instances, have recognized that the courts and commentators disagree on the appropriateness of such an instruction and, upon the following reasoning, have declined to rule on it:

> "In view of the state of the law and the record in the instant case, this Court will not pass on the issue at the present time. Even if this panel were to adopt the instruction, this panel would do so only prospec-

tively. Therefore, such a holding is not necessary for resolution of the instant case. The question is more properly left open for future consideration and perhaps for *en banc* determination by the entire Court." (Footnote omitted.)

Rouse v. Chicago, Rock Island and Pacific Railroad Company, Nos. 72-1124 and 72-1161, slip opinion at 6 (8th Cir. March 1, 1973); *Raycraft v. Duluth Missabe and Iron Range Railway Company,* No. 72-1049, slip opinion at 12 (8th Cir. January 16, 1973). We choose to dispose of the issue in the same manner here.

Affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

United States Court of Appeals
For the Eighth Circuit

No. 72-1399 September Term, 1972

Clyde H. Duncan, Appellee, vs. St. Louis-San Francisco Railway Company, a Corporation, Appellant.	Appeal from the United States District Court for the Eastern District of Missouri.

The Court having considered petition for rehearing en banc filed by counsel for appellant and, being fully advised in the premises, it is now here ordered that the petition for rehearing en banc be, and it is hereby, denied.

Considering the petition for rehearing en banc as a petition for rehearing, it is now here ordered that the petition for rehearing also be, and it is hereby, denied.

June 20, 1973

APPENDIX B

§ 51. Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; definition of employees

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, . . . for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

Apr. 22, 1908, c. 149, § 1, 35 Stat. 65; Aug. 11, 1939, c. 685, § 1, 53 Stat. 1404.

§ 53. Contributory negligence; diminution of damages

In all actions on and after April 22, 1908 brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, . . . the fact that the employee may have been guilty of contributory negligence

shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee. . . .

Apr. 22, 1908, c. 149, § 3, 35 Stat. 66.

§ 54. Assumption of risks of employment

In any action brought against any common carrier under or by virtue of any of the provisions of this chapter to recover damages for injuries to, . . . any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where such injury . . . resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier. . . .

Apr. 22, 1908, c. 149, § 4, 35 Stat. 66; Aug. 11, 1939, c. 685, § 1, 53 Stat. 1404.

§ 56. Actions; limitations; concurrent jurisdiction of courts

No action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued.

Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States.

Apr. 22, 1908, c. 149, § 6, 35 Stat. 66; Apr. 5, 1910, c. 143, § 1, 36 Stat. 291; Mar. 3, 1911, c. 231, § 291, 36 Stat. 1167; Aug. 11, 1939, c. 685, § 2, 53 Stat. 1404; June 25, 1948, c. 646, § 18, 62 Stat. 989.